

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

897

CA 19-00470

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF THE FORECLOSURE OF TAX
LIENS FOR THE YEAR 2012 (4-YEAR) OR PRIOR
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11
OF THE REAL PROPERTY TAX LAW OF THE STATE OF
NEW YORK BY THE COUNTY OF OSWEGO.

MEMORANDUM AND ORDER

KEVIN L. GARDNER, IN HIS OFFICIAL CAPACITY AS
OSWEGO COUNTY TREASURER, PETITIONER-RESPONDENT;

CHARLES R. TRUST, JR., RESPONDENT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (AMANDA M. THOMSON OF
COUNSEL), FOR RESPONDENT-APPELLANT.

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO, FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James
W. McCarthy, J.), entered September 5, 2018. The order denied
respondent's motion to vacate the default judgment of foreclosure
entered April 25, 2016.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: Petitioner commenced this in rem tax foreclosure
proceeding pursuant to RPTL article 11 seeking to foreclose delinquent
tax liens on the subject property. Petitioner subsequently sought and
obtained a default judgment of foreclosure that was entered in April
2016. In July 2018, respondent moved for, inter alia, vacatur of the
judgment. Supreme Court denied the motion, and we affirm. "A motion
to reopen a default judgment of tax foreclosure may not be brought
later than one month after entry of the judgment" (*Matter of County of
Herkimer [Moore]*, 104 AD3d 1332, 1333 [4th Dept 2013] [internal
quotation marks omitted]; see RPTL 1131). Here, the motion was time-
barred inasmuch as it was brought more than one month after entry of
the default judgment of foreclosure (see *Matter of County of Ontario
[Duvall]*, 169 AD3d 1508, 1508 [4th Dept 2019]; *Moore*, 104 AD3d at
1333).

Respondent contends that the court lacked jurisdiction to issue
the default judgment of foreclosure because petitioner failed to
comply with the notice requirements of RPTL 1125. We reject that
contention (see *Duvall*, 169 AD3d at 1508-1509; *Moore*, 104 AD3d at

1333-1334). Pursuant to RPTL 1125 (1) (a) (i) and (b) (i), petitioner was required to send notice of the foreclosure proceeding by both certified mail and ordinary first class mail to the owner whose interest was a matter of public record on the date the list of delinquent taxes was filed (see *Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1612 [4th Dept 2017]). “[T]he failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title” (*id.* [internal quotation marks omitted]). Here, petitioner established that he substantially complied with the notice requirements of RPTL 1125 (see *Matter of County of Herkimer [Jones]*, 34 AD3d 1327, 1328 [4th Dept 2006], *lv dismissed* 8 NY3d 955 [2007]).

Respondent’s contention that the court should have vacated the default judgment of foreclosure pursuant to CPLR 5015 (a) (1) and (3) is not preserved for our review (see *PNC Bank, N.A. v Harmonson*, 154 AD3d 1347, 1348 [4th Dept 2017]; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, we conclude that his contention is without merit (see *Matter of Foreclosure of Tax Liens*, 144 AD3d 1033, 1034-1035 [2d Dept 2016]). Finally, respondent contends that the default judgment of foreclosure should be vacated in the interests of substantial justice because there is no prejudice to petitioner. We conclude that such relief cannot be granted where, as here, the motion to vacate was untimely (see *Matter of County of Wayne [Schenk]*, 169 AD3d 1501, 1502-1503 [4th Dept 2019]).